

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs November 2, 2009

IN RE: BRANDON S.

Appeal from the Chancery Court for Anderson County
No. 08CH7939 William E. Lantrip, Chancellor

No. E2009-00102-COA-R3-PT - FILED JANUARY 28, 2010

This is a termination of parental rights case. On August 5, 2001, Brandon S. (“the Child”) was born to Robin S. (“Mother”) and Arnold S. (“Father”). Subsequently, Mother and Father divorced, Mother remarried, and Father, in January 2006, began serving a six-year jail sentence. Two years later, Mother and her new husband, John J. (“Stepfather”)(collectively, “the Petitioners”), filed a petition seeking to terminate Father’s parental rights in order to facilitate Stepfather’s adoption of the Child. At the conclusion of a bench trial, the court ordered Father’s parental rights terminated upon finding, according to the trial court by clear and convincing evidence, that Father had abandoned the Child by failing to provide support. Father appealed. We conclude that the record contains clear and convincing evidence supporting the termination of Father’s rights. Accordingly, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the Court, in which D. MICHAEL SWINEY and JOHN W. MCCLARTY, JJ., joined.

David K. Vander Sluis, Oak Ridge, Tennessee, for the appellant, Arnold S.

Jodi B. Loden, Clinton, Tennessee, for the appellees, John J. and Robin J.

OPINION

I.

On January 22, 2008, the Petitioners filed a complaint seeking to terminate Father's parental rights to the Child and asking the court to decree the adoption of the Child by Stepfather. Generally stated, the petition alleged three grounds for termination: (1) Father was under a criminal sentence of 10 or more years entered when the Child was under eight years of age; (2) Father abandoned the Child by failing to provide financial support; and (3) he abandoned the Child by failing to visit or by engaging in only token visitation.

A bench trial was held on August 20, 2008, just after the Child turned seven. The proof showed that Mother and Father married in March 2001. Just after the Child turned two, Mother and Father separated and Mother and the Child moved to Clinton near Mother's parents. Father remained in Jonesboro. At first, Father visited the Child every weekend, but his visits gradually tapered off to once a month. Father visited the Child during a total of five weekends in 2005 and three in 2006.

During the first year of their separation, Father provided Mother with some funds to help support her and the Child, but stopped giving her any money after June 2004. Mother filed for divorce in February 2005. Although a temporary parenting order required Father to pay child support of \$400 a month, he paid nothing for over two years until well after the divorce became final. The final divorce judgment was entered in May 2006.¹ According to Mother, Father's child support obligation was set in the final judgment at \$672 a month pursuant to the Child Support Guidelines. No visitation with Father was mandated because Father failed to complete required parenting classes. After the divorce was finalized, Father had minimal contact with the Child – he called him once and sent him one letter. At the time of the termination hearing, Father had not visited the Child for two years and had paid a total of only \$120 in child support.

Father professed that he loved the Child and regretted his criminal past. Father said that his business was improving and that he would be able to provide support for the Child. Father stated that he and the Child had a "great relationship" before he went to jail. Father's family and especially his mother kept some contact with the Child and passed along information about the Child while Father was in prison. Father conceded that he had not had any direct contact with the Child for about two years.

In January 2006, Father reported to jail to begin serving a six-year sentence for multiple felony thefts and a forgery related to dealings involving his construction business.

¹The divorce decree is not before us. Both parties indicate that a default judgment was entered against Husband.

He participated in a work release program that enabled him to continue operating his construction business 12 to 14 hours a week. Father was unable to offer an estimate of his earnings, saying only that it was “sometimes not much, sometimes it’s good.” From the money he made, Father paid \$920 a month in fees, restitution and court costs, but agreed he had not paid any child support. Father was incarcerated and lost his work eligibility for several months after he was charged with introducing contraband into the jail. While serving his time in jail, Father completed a residential program for substance abuse and obtained his GED. He testified that he was occasionally allowed a visit with the Child while on work release pursuant to the special permission of his supervising officer. His visits would be authorized based upon Father’s good behavior. Father said that visits with the Child were curtailed when he was in jail because the visits were “very tough” and he was ashamed. Based upon discussions with his attorney, Father believed he would be released on probation in September 2008.

In October 2007, Mother and Stepfather were married. Stepfather supported the Child financially and expressed his desire from “day one” to adopt him. Mother testified that the Child was angry and confused about Father and that the Child told her that Father was “not his dad anymore.” Mother concluded that termination of Father’s rights and adoption were in the Child’s best interest because the Child would have a “healthy, normal family life.” She added that Stepfather was a “great dad, and [the Child has] never been happier.” Since living with Stepfather, the Child has gained self-confidence and made straight A’s in school. Mother felt that continuing to have Father in his life would do the Child more harm than good. The Child’s maternal grandmother had observed the Child frequently, both before and after Mother remarried, and described the Child as being “totally different” – no longer easily upset and bitter – since Stepfather came into his life. She supported Stepfather’s adoption because the Child had told her of his desire that Stepfather adopt him since the day that he and Mother were married. By all accounts, Stepfather and the Child quickly developed a close, “father/son” relationship. The Child’s family pastor noted that the Child “made it clear” that he did not want a relationship with Father, but rather wanted to be with his “new” family. The pastor described the Child as “very well adjusted, very happy . . . , very content.” According to Stepfather’s mother, the Child spent time with his many “cousins,” seemed happy and referred to Stepfather as his “dad.” A guardian ad litem appointed for the Child reached similar conclusions. Following her independent investigation and interviews with all concerned parties, including the Child, the guardian ad litem recommended that Father’s parental rights be terminated on the grounds alleged and that Stepfather be allowed to adopt the Child.

Stepfather recalled that, when he first met the Child, the latter was very reserved and “scared of life in general.” The Child seemed excited that they would all be a family after Stepfather proposed to Mother at a family barbeque with the Child present. Stepfather and

the Child interacted, *e.g.*, Stepfather took the Child to school each morning, and Stepfather disciplined the Child when necessary by taking away privileges. The Petitioners supported allowing the Child to have contact with his Father, even if his rights were terminated, if that was what the Child wanted. Father had never called, written or sent anything to the Child since Mother had remarried. Stepfather wanted to formalize his role in the Child's life because "[i]n everyday practical living I already am his father."

Following the hearing, the trial court found that the allegation of abandonment by failure to support the Child had been established. In summary, the court found as follows:

I find clear and convincing evidence that [Father] willfully failed to support his son during the four month period which precede[d] his incarceration. I further find by clear and convincing evidence that [Father] knew the residence of [Mother] and [Child], knew of the child support order, and was gainfully employed and fully capable of providing support. From these facts I find by clear and convincing evidence that cause exists to terminate the parental rights of [Father] because he has willfully abandoned his son by failing to support him.

Upon further finding that termination of Father's rights was shown, clearly and convincingly, to be in the best interest of the Child, the trial court terminated Father's parental rights. The trial court did not address the remaining two alleged grounds for termination. Father filed a timely notice of appeal.

II.

Father presents one issue for our consideration:

Did the trial court erred in finding that the proof established by clear and convincing evidence that Father's parental rights should be terminated for willfully failing to support the Child?

III.

We employ the following standard of review in cases involving the termination of parental rights:

[T]his Court's duty. . . is to determine whether the trial court's findings, made under a clear and convincing standard, are supported by a preponderance of the evidence.

In re F.R.R., III, 193 S.W.3d 528, 530 (Tenn. 2006).

The trial court's findings of fact are reviewed de novo upon the record accompanied by a presumption of correctness unless the preponderance of the evidence is otherwise. *Id.*; Tenn. R. App. P. 13(d). In weighing the preponderance of the evidence, great weight is accorded to the trial court's determinations of witness credibility, which shall not be reversed absent clear and convincing evidence to the contrary. See *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002). Questions of law are reviewed de novo with no presumption of correctness. *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 744-45 (Tenn. 2002).

It is well established that parents have a fundamental right to the care, custody, and control of their children. *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *In re Drinnon*, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988). While parental rights are superior to the claims of other persons and the government, they are not absolute, and they may be terminated upon appropriate statutory grounds. See *Blair v. Badenhope*, 77 S.W.3d 137, 141 (Tenn. 2002). A parent's rights may be terminated only upon "(1) [a] finding by the court by clear and convincing evidence that the grounds for termination of parental or guardianship rights have been established; and (2) [t]hat termination of the parent's or guardian's rights is in the best interests of the child." T.C.A. § 36-1-113(c)(Supp. 2007); *In re F.R.R., III*, 193 S.W.3d at 530. Both of these elements must be established by clear and convincing evidence. See T.C.A. § 36-1-113(c)(1); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). Evidence satisfying the clear and convincing evidence standard establishes that the truth of the facts asserted is highly probable, *State v. Demarr*, No. M2002-02603-COA-R3-JV, 2003 Tenn. App. LEXIS 569, 2003 WL 21946726, at *9 (Tenn. Ct. App. M.S., filed August 13, 2003), and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence. *In re Valentine*, 79 S.W.3d at 546; *In re S.M.*, 149 S.W.3d 632, 639 (Tenn. Ct. App. 2004). It produces in a fact-finder's mind a firm belief or conviction regarding the truth of the facts sought to be established. *In re A.D.A.*, 84 S.W.3d 592, 596 (Tenn. Ct. App. 2002); *Ray v. Ray*, 83 S.W.3d 726, 733 (Tenn. Ct. App. 2001).

IV.

As we have noted, the trial court terminated Father's parental rights pursuant to Tenn. Code Ann. § 36-1-113 (g)(1)(2005).² The statute applicable to this case provides, in relevant part, as follows:

(g) Initiation of termination of parental or guardianship rights may be based upon any of the following grounds:

(1) Abandonment by the parent or guardian, as defined in § 36-1-102, has occurred;

In turn, Section 36-1-102, referenced above, provides for the termination of parental rights on the ground of abandonment as follows:

(1)(A) For purposes of terminating the parental or guardian rights of parent(s) or guardian(s) of a child to that child in order to make that child available for adoption, "abandonment" means that:

* * *

(iv) A parent or guardian is incarcerated at the time of the institution of an action or proceeding to declare a child to be an abandoned child, or the parent or guardian has been incarcerated during all or part of the four (4) months immediately preceding the institution of such action or proceeding, and either has willfully failed to visit or has willfully failed to support or has willfully failed to make reasonable payments toward the support of the child for four (4) consecutive months immediately preceding such parent's or guardian's incarceration, or the parent or guardian has engaged in conduct prior to incarceration that exhibits a wanton disregard for the welfare of the child. . . .

Under subdivision (1) of Section 36-1-102, " 'willfully failed to support' or 'willfully failed to make reasonable payments toward such child's support' means the willful failure, for a period of four (4) consecutive months, to provide monetary support or the willful failure to

²Tenn. Code Ann. § 36-1-113(g) was amended effective January 1, 2009. As the amendment has no effect on the present case, we will cite to the version of the statute in effect at the time of the trial throughout this opinion.

provide more than token payments toward the support of the child.” Tenn. Code Ann. § 36-1-102(D)(2007).

In the present case, the petition specifically alleged abandonment of the Child by Father in that Father “has failed, without good cause or excuse, to make reasonable and consistent payments for the support of [the Child] in accordance with [statutory] child support guidelines” Father responds that the element of willfulness was not established because the record contains no proof of his ability or his awareness of his obligation to pay child support from September through December 2005 – the four months preceding his incarceration. Notably, we need not determine whether Father in fact provided financial support for the Child during the period in question. Father concedes that he did not. As a result, we limit our analysis to whether Father’s admitted failure to support the Child was willful under the law.

With regard to the concept of willfulness in termination of parental rights cases, this court has observed:

The statutory requirement that the failure to visit or to support must be willful is constitutionally mandated, and intent is a necessary element of abandonment. Thus, if the failure to support or visit cannot be proved to be intentional or willful, then abandonment has not been shown.

The concept of willfulness or intent is often the determining factor in whether the existence of that ground has been shown by clear and convincing evidence.

The question of intent or willfulness is fact specific and depends on the totality of circumstances. Failure to provide support is willful if the parent is aware of his or her duty to support, is capable of paying support, makes no attempt to provide support, and has no justifiable excuse. Willful conduct is intentional or voluntary; often, intent must be inferred from circumstantial evidence. Willfulness is a question of fact that the trial court is in the best position to make.

In re W.B., Nos. M2004-00999-COA-R3PT, M2004-01572-COA-R3-PT, 2005 WL 1021618 at *8-9 (Tenn. Ct. App. M.S., filed April 29, 2005) (internal citations omitted).

Father first submits that his failure to pay child support cannot be deemed willful because “he was not aware of any order requiring his payment of child support” until he

received the parties' divorce decree sometime after he was incarcerated. At trial, Father's testimony on this point was at best unclear. Father testified as follows:

Q: Okay. You and [Mother] separated . . . and in February of 2005 she filed for divorce, correct?

A: Uh-huh. (Affirmative).

Q: And you are aware that there was a temporary parenting plan that was entered when she filed that the chancellor signed.

A: Uh-huh. (Affirmative).

Q: And you're aware that you're required to pay support under that order, correct?

A: Yes.

Q: Did you ever pay any support?

A: No.

Q: And under the permanent parenting plan that was entered in the divorce you're aware that you're required to pay support, correct?

A: I'm sorry. Can you ask that again?

Q: When the permanent parenting plan was entered by the Court in the default divorce you're aware that it required you to pay support for [the Child], correct?

A: I was incarcerated at the time when all that happened. I got one set of papers.

In finding that Father willfully failed to pay support, the trial court expressly found that Father's claim that he had no knowledge of either the order of temporary support or of the divorce until after it became final was not credible. A person's demeanor and credibility as a witness are significant in determining intent. It is the trial court that is in the best position to make a determination of willfulness. *In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003). In any event, Father's knowledge of the support orders is not in and of itself

determinative of whether his failure to support was willful. The appellate courts of this state have held that a parent's obligation to pay support for his or her child exists even in the absence of a court order to do so. See *State v. Wilson*, 132 S.W.3d 340, 343 (Tenn. 2004); *State v. Culbertson*, 152 S.W.3d 523, 524 (Tenn. Ct. App. 2004). In this regard, Father was aware of his responsibility to support the Child as he had initially made payments toward the Child's rent, daycare, and other living expenses when the parties separated. Moreover, at trial, Father testified: "I'd like to be a dad to him that I've never been, and I would like to . . . begin to support him better and do the things that a father is supposed to do." The evidence preponderates in favor of the trial court's finding that Father knew of his duty to pay child support but chose not to do so.

Next, Father contends that there was no proof at trial that he had the financial means to support the Child. Regarding this factor, the proof showed that Father operated his own construction company throughout the marriage and ever since, even continuing his business while serving his criminal sentence on a work release program. Even while working limited hours, Father was able to earn enough income to pay \$920 a month in court-ordered restitution for his criminal offenses as well as mandatory fees for participation in the work release program. Father testified that he would be able to support the Child through this same business after he was released. Father correctly notes that no documents related to the divorce filings or final decree are before us. However, he does not dispute Mother's testimony that temporary child support was initially set at \$400 a month in February 2005, and later set at \$679 a month at the time the final divorce judgment was entered. Again, the proof showed that Father gave money for child support until June 2004. Father gave no indication why he ceased providing Mother any financial support after this time. The trial court summarized its findings as follows:

[Father] testified that he was a self-employed contractor during [the four months in question]. He continues this employment even now as part of his work release. His testimony was to the effect that he had good months and slow months. He has earnings even now which permit him to pay his fines and costs associated with his incarceration. No reason or excuse is shown for [Father's] failure to provide support as ordered or for not contributing any amount toward the support his son. It is significant to note that this employment was the same after separation as it was during the marriage"

The evidence does not preponderate against the trial court's finding that Father was gainfully employed but failed for no apparent reason to pay any money at all toward the Child's support in the four months before his incarceration, and indeed, for almost two years

from June 2004 to August 2006. For this reason, neither does the evidence preponderate against the trial court's finding that Father's failure to pay support was willful in nature.

Because Father's abandonment of the Child by non-support was established by clear and convincing evidence, we need not discuss the remaining grounds for termination alleged in the petition. Indeed, as we noted earlier, the other grounds set forth in the petition were not addressed in the trial court's decision. "The existence of at least one statutory basis for termination of parental rights will support the trial court's decision to terminate those rights." *In re C.W.W.*, 37 S.W.3d 467, 473 (Tenn. Ct. App. 2000). In addition, however, it must be shown that termination of parental rights is in the best interest of the child. *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). In finding that this second prong of our analysis – the best interest of the child – also weighed sufficiently in favor of terminating Father's parental rights, the trial court cited the following reasons:

1. [Father] has been incarcerated for a 6 year sentence since January, 2006.
2. That prior to that date there has been minimal contact with this child who is now 7 years of age.
3. That the child has developed a close bond with the step-father and is now part of a loving family unit.
4. That [Father] incurred additional criminal charges while in jail.
5. That [the Child] has developed a strong emotional and psychological attachment to [Stepfather].
6. That there is uncertainty as to when [Father] will be released from jail.

Father briefly argues that termination was not shown to be in the Child's best interest because the evidence does not show that "the continuation of the parent-child relationship would be psychologically, physically, or emotionally detrimental to [the Child]. . . ." The non-exclusive list of factors that may be considered in determining whether termination of parental rights is in the best interest of the child are found in Tenn. Code Ann. § 36-1-113(i). In the present case, the trial court found, either explicitly or implicitly, the following factors to be relevant: (1) "Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;" (2) "Whether the parent or guardian has maintained

regular visitation or other contact with the child;” (3) “Whether a meaningful relationship has otherwise been established between the parent . . . and the child;” and (4) “The effect a change of caretakers and physical environment is likely to have on the child’s emotional, psychological and medical condition.” *See* Tenn. Code Ann. § 36-1-113(i)(1), (3), (4), and (5). Based on the cited factors and our review of the entire record, the evidence does not preponderate against the trial court’s finding that termination of Father’s parental rights was shown by clear and convincing evidence to be in the Child’s best interest.

V.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant, Arnold S. This case is remanded to the trial court, pursuant to applicable law, for enforcement of the court’s judgment and for the collection of costs assessed below.

CHARLES D. SUSANO, JR., JUDGE